313 U.S. 587
No. 1081

FILED
MAY 23 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1940.

CHRISTIAN W. BECK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Seventh Circuit
and

SUPPORTING BRIEF.

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pro se

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To the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Christian W. Beck, the petitioner, by Harry Fishbein and Edward K. Schwartz, his counsel, petitions this Honorable Court to grant the writ of certiorari, addressed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding it and the clerk thereof to certify to this Honorable Court the records and proceedings of the above-entitled case in that court, numbered 7344-48 therein, wherein your petitioner was appellant, and respondent United States of America was appellee, together with its opinion therein, for review and determination of said cause by this Court.

Petitioner tenders herewith his petition, supporting brief, and a certified copy of the entire record in the cause, together with twelve copies of the record as printed in the United States Circuit Court of Appeals.

OPINION BELOW.

The opinion of the Circuit Court of Appeals was filed March 6, 1941. Petition for rehearing was denied March 27, 1941. A copy of the opinion appears in the appendix which follows petitioner's supporting brief.

STATEMENT OF MATTERS INVOLVED.

The United States Circuit Court of Appeals for the Seventh Circuit on March 6, 1941, affirmed a judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, convicting the petitioner on eighteen counts of an indictment, the first seventeen of which each charged this petitioner, along with a number of others as codefendants, with having devised a scheme and artifice to defraud and for obtaining money and property from certain named persons by means of false and fraudulent pretenses, representations and promises, and with using the mails to further the scheme. Each of the first seventeen counts specifically charged the mailing of a separate letter allegedly in furtherance of the scheme. The eighteenth count charged the petitioner, along with the same codefendants, with unlawfully conspiring to carry on the unlawful enterprise charged in the preceding seventeen counts.

Upon a trial before a jury the petitioner was found guilty upon all counts, and the petitioner was sentenced on the first seventeen counts to a term of five (5) years in prison, and on the eighteenth, or conspiracy count, his

sentence was fixed at two (2) years in prison (R. pp. 591, 592).

Although the record is voluminous, the following may be regarded as a fair, though brief, statement of the facts developed by the evidence:

In about May, 1936, and for some time prior, this petitioner was engaged as an officer of Crown Hill, Inc., and Crown Hill Trust in the conduct and operation of a cemetery enterprise known as the Crown Hill Cemetery, which was situated in Ohio (R. p. 469) at a point between Cleveland and Akron. At the time of trial the petitioner was a resident of Cleveland, where the headquarters of the business were located since 1929, and Cleveland was his residence since 1930. Prior to going to Cleveland, petitioner lived in Tulsa and he had developed burial parks both there and in Oklahoma City. Coming to Cleveland in about December, 1928, he considered the possibilities of developing a burial park in Cleveland, and as a consequence, the property which later was known as Crown Hill Cemetery, consisting of two farms, one of 150 acres and one of 100 acres, was purchased by him for $168,000.00 or $187,000.00 with a down payment of $50,000.00 cash. Title to the property was held by Crown Hill, Inc., a nonprofit association, and another organization known as the Crown Hill Trust, a Massachusetts Trust, was organized to act as selling agent for the corporation. The petitioner headed both companies as president (R. p. 469).

After acquiring this land, $680,000.00 were spent from time to time, up to December 15, 1936, for improving and developing the cemetery (R. pp. 478-9), including landscaping, sodding, grading, planting of trees, flowers, shrubbery and nursery stock; and erection of a rustic brick fence; erection of a chapel and an administration building, with furnishings and an organ; erection of an orna-

mental fountain, designed by the same person who designed the Buckingham Fountain in Chicago, besides other improvements. At the time of trial further improvements were in progress, and still others in prospect (R. p. 479). The property so being developed was divided into cemetery lots, containing two to four burial plots and these were sold by the selling agent, the Crown Hill Trust, which had a number of salesmen, among whom were some of the defendants, as will hereafter appear. After the project had been going on for several years, and more specifically in the early part of 1936, Robert Stickney, a codefendant, also on trial, who had been an employee of petitioner, came to him and stated that he was considering starting a company in Chicago (R. pp. 470, 152) to deal in cemetery lots and that he, along with another Crown Hill employee, Mike Gordon (R. p. 527), also a codefendant, wished to purchase lots from Crown Hill and then resell them. There was objection interposed by petitioner to Robert Stickney's going (R. p. 152) because he needed Stickney in Cleveland, but this notwithstanding, Stickney announced to petitioner his intention of going to Chicago with Gordon and then there ensued a discussion as to what arrangements could be made for the sale of lots to the Chicago organization by Crown Hill (R. pp. 152 and 153). The particular sections to be available for sale in this manner to the new organization were numbers 42, 72 and 73. The prices, both of purchase and resale, were discussed and then came up the question of financing the operations in Chicago (R. p. 154).

The Crown Hill Trust agreed to finance Stickney and Gordon up to $7,500.00 (R. p. 155). Thereafter Stickney went to Chicago (R. p. 151), rented quarters, and Mrs. Helen B. Nichols, a codefendant not on trial, followed (R. p. 84). Gordon came later (R. p. 572). A Massachusetts trust agreement was drafted and a trust created called

the First Commonwealth Trustees. The matter of the trust was handled by Arthur C. McHenry, a codefendant not on trial. Mrs. Nichols and Mr. McHenry (R. p. 68) were named the Trustees. A bank account was opened (R. p. 84). One thousand lots were purchased from the Crown Hill, Inc., by the First Commonwealth Trustees (R. pp. 172 and 173) under an agreement. Office furniture was purchased, office help was employed and lists containing names of holders of defaulted bonds and other securities were purchased (R. p. 85). A mailing card index system was installed (R. p. 247). Various persons were written letters with which were enclosed blank inquiry cards (R. pp. 189 and 208). Salesmen, who were codefendants in the case, were given the inquiry cards, which were signed and returned by the persons making inquiry (R. p. 528). The salesmen would approach these people and procure from them bonds and other securities and sometimes cash in payment for burial lots, as hereinafter more fully described. The method used was this: Salesmen would send in the securities along with the written authority from the owner to the First Commonwealth Trustees, authorizing them to dispose of such securities. Sales of the securities were made to brokers, who would issue confirmation slips indicating the amount realized from the sale of the securities. The amount thus realized was divided by $160.00, being the established price per Crown Hill lot, and for which certificates of perpetual burial rights were issued to purchasers, together with a form of listing contract, by the terms of which the certificate owner would receive in return for an exclusive contract of resale, a guaranty of the payment of 50 cents per month per lot for a period up to twenty-four months. These transactions were carried on, in part, by mail (R. p. 87). The resale listings, when signed, were then to be given to the Crown Hill Trust for them to resell (R. p. 88). The resale

listings, however, were not, in fact, mailed by the First Commonwealth Trustees to Crown Hill Trust until after the petitioner severed his connection with the Crown Hill Trust on December 15, 1936 (R. p. 498). The First Commonwealth Trustees operated in Chicago until May 18, 1937 (R. p. 88).

Evidence introduced by the Government for the purpose of showing the use of the mails in connection with the specific charges which form the basis of the various substantive counts, showed that the dates of the only alleged mailings on which the Government relied were subsequent to that on which the undisputed evidence showed this petitioner to have disassociated himself from all connection with the alleged illegal operations. The date on which this petitioner terminated his connections, as aforesaid, was December 15, 1936 (R. pp. 381, 270, 80 and 500).

The instances of alleged mailings occurring after termination of petitioner's connections are shown in the Government's own evidence as follows:

Count	Date of Mailing	Sender
15	January 15, 1937	John Martin (R. p. 31)
16	January 19, 1937	John Martin (R. p. 33)
7	January 27, 1937	John Martin (R. p. 19)
14	February 1, 1937	John Martin (R. p. 30)
5	February 2, 1937	John Martin (R. p. 16)
2	February 17, 1937	John Martin (R. p. 12)
8	April 10, 1937	H. S. Nichols (R. p. 21)
10	May 13, 1937	John Martin (R. p. 24)
9	May 22, 1937	John Martin (R. p. 22)
11	May 28, 1937	John Martin (R. p. 25)
3	July 26, 1937	John Martin (R. p. 14)
12	March 16, 1937	H. S. Nichols (R. p. 27)
1	March 8, 1937	John Martin (R. p. 10)

In respect to all counts, there was a total absence of any direct evidence of this petitioner's connection with (a) the

mailings and (b) the commission of any other acts in furtherance of the unlawful scheme.

The Government's evidence as to the transactions referred to in each of the substantive counts was substantially of one pattern. There was evidence of alleged misrepresentations by salesmen of the nature of the transaction which the salesmen were seeking to bring about. This evidence tended to show the existence of a scheme to defraud, participated in by certain persons.

There was no evidence to show knowledge of this petitioner of the commission of any of the fraudulent acts committed in connection with the sale of the lots and there was no evidence to show that he authorized any of these acts or that he ever ratified any of them. He had nothing to do with the guaranty or the formation of the guaranty company. If any evidence can be said at all to have existed to connect the petitioner with any of the wrongful doings, such evidence was entirely circumstantial or based upon inference. But the record is devoid of circumstantial evidence of a substantial nature, and if inferences are drawn they can only be drawn from other inferences and not from any evidence adduced at the trial.

This petitioner testified in his own behalf and denied all connection with the First Commonwealth Trustees, except as relates to the sale to them of lots in the Crown Hill Cemetery. He denied all knowledge of the facts and fraudulent representations and promises and pretenses engaged in by the various salesmen and others connected with the First Commonwealth Trustees; he denied that he ever authorized such acts on their part or that he ratified them. He further stated, as the Government's own case showed, that the Chicago enterprise of the First Commonwealth Trustees was conceived by Stickney, who directed and had full charge of the activities of the organization during

the period he was connected with it, with the defendant Gordon as the sales manager in charge of all salesmen (R. p. 473). Petitioner's evidence, which was undisputed, was that he had nothing to do with the creating of the common-law trust, nor did he make any suggestions as to who the trustees should be, nor did he know who the trustees were until they were ready to close the contract for the purchase of lots at wholesale (R. pp. 171-2), which was signed by the two trustees; that he did not employ office help for the First Commonwealth Trustees, nor did he rent office space, set up a bank account, nor employ or discharge any of its employees, nor did he receive any certificates of beneficial interest in the First Commonwealth Trust, and the only interest that he had was that for money due Crown Hill for lots deeded to First Commonwealth Trustees, which were not fully paid for.

There occurred in the trial, after considerable evidence had been taken, an incident, the effect of which was to deprive the petitioner of the fair trial to which he was entitled. This was the situation created by the calling of the codefendant, Stickney, as a witness for the Government (R. pp. 149, 150 and 151). When this stage of the case was reached there had already been four days of trial, during which Stickney, who was not represented by counsel, was in constant conference with, and receiving the cooperation of, the various lawyers for the defendants, including this petitioner's counsel, and at the time Stickney was called there had been no previous notice or knowledge on the part of this petitioner or his counsel that he was to be called, and that he would testify for the Government. This unusual procedure was appropriately objected to at the time, and a motion to withdraw a juror and declare a mistrial was presented, but overruled, when, on questioning Stickney, the Court was advised he wished to take the stand and testify.

Other evidence was improperly received over petitioner's objection, and subsequent motions by the petitioner to strike out certain evidence which had been improperly received were overruled. Motions for a directed verdict of not guilty filed by this petitioner at the close of the Government's case and again at the close of the whole case were overruled. After a verdict finding the petitioner guilty on all counts, a motion for a new trial, which this petitioner filed, proved unavailing, and, in due course, petitioner took his appeal.

QUESTIONS PRESENTED.

1. Was the evidence sufficient to warrant submission of the case to the jury, or should there instead have been a directed verdict of acquittal?

2. Where the Government's own evidence shows that the accused terminated his connections with the alleged unlawful enterprise prior to the time when any of the mailings occurred which are the basis of the several counts of the indictment, will a conviction be permitted to stand?

3. If subsequent to such termination by the accused of his connection with the alleged unlawful conspiracy as established by the evidence of the prosecution itself, he requests the doing of an act which is not in furtherance of the conspiracy, but which is instead entirely consistent with his withdrawal therefrom, is there thereby created a question of fact for the jury, as to whether the accused had made an effective withdrawal from the conspiracy?

4. Was the petitioner denied a fair and impartial trial when all the factors and circumstances surrounding the calling and use of petitioner's codefendant, Robert Stickney, as a Government witness, are taken into account?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT OF CERTIORARI.

Petitioner respectfully submits that a review of this case on writ of certiorari should be allowed for the reasons following:

It should be allowed because the United States Circuit Court of Appeals has erroneously applied the Federal and Constitutional law in deciding the exceedingly important question whether, under facts such as are disclosed in this case, it can be said that petitioner received a fair and impartial trial. It should be allowed because in convicting petitioner, the District Court and the Circuit Court of Appeals have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

It should be allowed because the Circuit Court of Appeals has affirmed a conviction in a situation where the record disclosed that petitioner was denied a fair and impartial trial. Under the well-settled holdings as to what constitutes a fair and impartial trial, and particularly under the authority of the very case on which the Court of Appeals based its decision, viz.: Heitler v. U. S., 244 Fed. 140, the petitioner in the instant case did not receive a fair and impartial trial. Furthermore, the Court of Appeals in its opinion, while evidently recognizing the force of the contention made by the petitioner on this point, justified its ruling in the following language (p. 7):

> "The trouble with this argument is that there is nothing in this record indicating that Beck has been prejudiced; consequently, we are unable to say that Beck was deprived of a fair and impartial trial."

The determination of the question whether, under the facts disclosed by the record, the petitioner was prejudiced,

should be of considerable public importance in furnishing a guide for the conduct of trials in Federal Courts, which will assure to the defendant, in a similar situation, a trial which is both fair and impartial.

There is a noticeable dearth of authority on the precise point here involved, with no decision by the United States Supreme Court so far as we can find, and the only case presenting a like situation is the Heitler case, supra, which would seem to sustain this petitioner's position.

The Supreme Court of the United States has apparently never defined what exactly constitutes a fair trial, and inasmuch as the right to a fair trial is a sacred one, of basic public importance, this Court should finally settle for the guidance of all Federal Courts, what does constitute a fair trial.

Certiorari, as herein prayed, should also be allowed because the Court of Appeals has in effect upheld a conviction where, under the Government's own evidence, he was entitled to an acquittal.

The evidence as referred to in the opinion (p. 9) of the Court of Appeals on this point was:

> "The record discloses that appellant Beck resigned from Crown Hill, Inc., and Crown Hill Trust on December 15, 1936, but it also appears that in May, 1937, at the time that Commonwealth closed its offices (after the date alleged in the first and last count of the indictment), he informed Mrs. Nichols to redeed those lots which remained unsold by Commonwealth to the First Refunding Corporation of Cleveland."

All the mailings referred to in the indictment took place after December 15, 1936, which was the time of petitioner's withdrawal from the alleged conspiracy brought about by his resignation above referred to. Yet, solely because of the occurrence in May, 1937, mentioned in the portion of

the opinion above quoted, the Court of Appeals disregarded the fact of the previous withdrawal from the conspiracy which the Government itself had proved and held that by this happening a question of fact was created which required the jury to decide whether an effective withdrawal from the conspiracy had been made. If this incident were one which could be said to be in furtherance of the conspiracy, or if it were not entirely consistent with the previous withdrawal, the view of the Court of Appeals on this point would not be open to question, but it will be found that this occurrence, far from being in furtherance of the unlawful scheme, was just the opposite, and if anything, emphasized the petitioner's disassociation from the wrongful enterprise. In this situation this Court should allow certiorari to the end, that not alone should no conviction be allowed to stand where the evidence does not support it, but also to clarify and eliminate confusion as to what constitutes an effective withdrawal from a conspiracy.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the U. S. Circuit Court of Appeals, for the Seventh Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals in the case number 7344-48, entitled on its docket U. S. A. v. Beck et al., to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; that the judgment herein of the said Circuit Court of Appeals be reversed, and petitioner prays for such further relief as to the Court may seem proper.

HARRY FISHBEIN,
EDWARD K. SCHWARTZ,
Counsel for Petitioner.

BRIEF

In Support of Petition for Writ of Certiorari.

JURISDICTION.

Certiorari is sought in this case upon the authority of Section 240 (a), as amended [28 U. S. C. A., Section 347 (a) 1], which gives this Court jurisdiction to review any judgment or decree of the United States Circuit Court of Appeals.

The judgment became final on March 27, 1941, when the petition for rehearing was denied.

OPINION OF COURT BELOW.

The opinion of the Circuit Court of Appeals, written by Kerner, J., was filed March 6, 1941, and appears in the appendix hereof. It is reported in 118 Fed. (2nd) 178.

STATEMENT OF THE CASE.

A full statement of the case has been given in this petition under the heading, "Statement of Matters Involved," which, in the interest of brevity, is hereby adopted and made a part of this brief.

ARGUMENT.

I.

The evidence was insufficient to sustain petitioner's conviction, and the judgment should therefore be reversed.

Viewing the evidence as it stood at the close of the entire case, this is what we find. At the inception of the allegedly wrongful scheme this petitioner, who had been for years connected with the enterprise of developing and operating burial parks, was still actively carrying on this undertaking where he had for years previously, in Cleveland, Ohio, where he resided. The burial park there was known as Crown Hill Cemetery.

In early 1936, the evidence showed, he was approached by Stickney, a codefendant, who testified for the Government, with the statement that he, Stickney, wished to terminate his connection with the petitioner's enterprise in Cleveland and start a company of his own in Chicago in collaboration with Mike Gordon, another defendant. This business in which Stickney wanted to embark was the sale of cemetery lots, and to that end he sought this petitioner's views about the idea, and wanted to know on what basis his organization, when formed, could purchase lots from the Crown Hill Trust, who were the selling agents of the lots in Crown Hill Cemetery. Stickney's idea, as conveyed to this petitioner, was that after purchasing the lots the concern that he was going to start in Chicago would then go out and resell them at a profit. At first, this petitioner demurred at Stickney's leaving his connection with the petitioner in Cleveland, but when Stickney was insistent, he yielded, and discussed with him the prices and terms at which the lots would be sold in Chicago.

The upshot was that an agreement was entered into in

writing, it being Government Exhibit 223 (R. p. 170), and Stickney and his associates got under way. Without any participation on this petitioner's part, and without any advice in so far as the evidence discloses, the Chicago undertaking began to blossom with the formation by the Chicago personnel of a Massachusetts Trust to carry on the business under the name of First Commonwealth Trust. The evidence then shows that they launched into various activities, some of which are the basis for the prosecution here undertaken.

As the evidence is examined, we submit that the only connection which it shows this petitioner had with these operations was confined to the following:

(a) The petitioner caused money to be advanced to the Chicago group against future commissions payable to Stickney from transactions he carried on while in petitioner's employ in Cleveland.

(b) This petitioner agreed to sell to the Chicago outfit certain lots in the Crown Hill Cemetery, the details of the agreement being embodied in Government Exhibit 223 (R. p. 170).

There is an entire absence of any substantial evidence which would tend to show that the salesmen and other agents of the First Commonwealth Trust were being directed or counseled by this petitioner or were under this petitioner's supervision or direction, or that he had any authority whatsoever over them.

There is an utter lack of any evidence that this petitioner was to profit by the operations of the Chicago group, except in respect to the possible profit derived from the sale by the Crown Hill Trust of the lots to the First Commonwealth Trust. There is likewise no evidence that this petitioner derived one penny from the income of the First Commonwealth Trust or that he was ever to derive a solitary penny.

The evidence showed no contact between this petitioner and any of the individuals in the Chicago outfit, other than with Stickney, Gordon, Mrs. Nichols and McHenry and Martin. In so far as these contacts were concerned, the evidence showed that they were limited in scope to those matters strictly pertaining to the sale of lots by Crown Hill to the First Commonwealth Trust. There was no evidence of any contact between him and persons allegedly victimized.

Nowhere is there any direct evidence that any of the allegedly fraudulent representations, promises and pretenses were made with this petitioner's knowledge; even more manifest is the total absence of any direct evidence whatever that any such allegedly fraudulent representations, promises and pretenses were authorized by the petioner, or that he ever ratified any of such acts.

The evidence showed the conduct of this petitioner to have been such as would be equally consistent with his innocence as with any possible guilt.

It has been consistently held that in order for circumstantial evidence to support a conviction, **the circumstances must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence.**

Paddock v. U. S., 79 Fed. (2d) 872;
U. S. v. Morley, 99 Fed. (2d) 683.

As was stated in U. S. v. Morley, supra (l. c. 685):

> "If the accused's acts and assurances are reconcilable, then no jury question is presented and the defendant should be dismissed. If, however, there be irreconcilability—if the acts of the accused dispute his assurances of innocence and the conflict is vital, then the court must let the jury weigh the conflicting evidence and decide."

In the case of Mazurosky v. U. S., 100 F. (2nd) 958, the

Ninth Circuit Court of Appeals reversed a conviction for participating in a scheme to defraud and for conspiracy to do the same even though there was proof that there was such a scheme, and that the defendant, in cashing checks derived from the unlawful transactions, might be suspected of having guilty knowledge of the existence of the scheme and conspiracy.

In the case at bar there is at most only suspicion that this petitioner had guilty knowledge of the wrongful activities of the persons connected with the First Commonwealth Trustees.

We respectfully submit, on the record as a whole, the evidence is insufficient to sustain the petitioner's conviction, and the judgment should be reversed.

Clyatt v. U. S., 197 U. S. 207;
Gambina v. U. S., 275 U. S. 310.

II.

The Government's own evidence showed that the petitioner had disassociated himself from the enterprise complained of prior to the time when all the mailings occurred which are the basis of the several counts of the indictment, and hence the conviction should not stand.

This evidence showed, as pointed out in the opinion of the United States Circuit Court of Appeals (R. p. 9), that petitioner resigned from Crown Hill, Inc., and Crown Hill Trust on December 15, 1936. All the mailings used as a basis for the indictment occurred after that date.

If a scheme had actually existed as charged in each of the counts of the indictment, but before the particular offense had actually been committed (and there was no offense until the mails were used) this petitioner severed all connection with the scheme, then anything thereafter

done by others could not operate to charge him with responsibility for commission of the crime.

See

Marino v. U. S., 91 Fed. (2d) 691;
Miller v. U. S., 277 Fed. 721;
U. S. v. Britton, 108 U. S. 199, 2 S. Ct. 531, 27 L. Ed. 698;
Dimond v. Shine, 199 U. S. 88, 125 S. Ct. 766.

As stated in 15 C. J. S. 1110:

> "Where an overt act is essential to a conspiracy, a conspirator may avoid guilt by withdrawing from the conspiracy prior to the commission of an overt act."

The Court of Appeals, however, in ruling against this contention, stated in its opinion (R. p. 9):

> "The record discloses that Appellant Beck resigned from Crown Hill, Inc., and Crown Hill Trust on December 16, 1936, but it also appears that in May, 1937, at the time that Commonwealth closed its offices (after the date alleged in the first and last count of the indictment), he informed Mrs. Nichols to re-deed those lots which remained unsold by Commonwealth to the First Refunding Corporation of Cleveland."

It would appear from the foregoing that the Court of Appeals conceded that, except for the incident in May, 1937, above referred to, a complete and effectual withdrawal would have been established by petitioner's resignation from Crown Hill, Inc., and Crown Hill Trust on December 15, 1936, as shown by the Government's own evidence. Does, then, the testimony of Mrs. Nichols about the later occurrence make for a jury question? Certainly what thus transpired in May could not be said to be in furtherance of the conspiracy to defraud. Rather, it would appear to be just to the contrary. Even if it is not actually additional evidence confirming the previously effected withdrawal, it does not amount in fact to any

evidence, we believe, which tends to put in doubt in any way the previously positive withdrawal. And, if we are correct in assuming that because the Government's own evidence showed the disassociation of petitioner from the unlawful enterprise in December, 1936, it was sufficient to remove that as a jury question, then we earnestly urge that the happening in May, shown above, is also not sufficient to create a jury question. On this point we respectfully submit that the Court of Appeals seemed to have given the particular episode an undue interpretation which has had the effect of putting upon this petitioner responsibility for the alleged acts, including mailings, occurring after he had actually severed completely his connections with the alleged fraudulent activities.

III.

The petitioner was deprived of a fair and impartial trial by reason of the circumstances surrounding the calling as a witness and the giving of testimony by the codefendant, Robert Stickney.

At the outset, we should like to make it clear that we do not wish to be understood as contending that generally speaking the Government would not have had the right to use Stickney as its witness. On the contrary, we concede that in an ordinary situation that right would not be open to question. But the precise occurrence in this case was of such unusual and prejudicial character as required the granting of petitioner's motion to withdraw a juror and declare a mistrial.

The setting at the time he was called was this: the case had been on trial for some four days. Stickney was in continual conference with his codefendants and with counsel, including this petitioner's counsel, and up to the time Stickney was called by the Government neither this

petitioner nor his counsel had any prior knowledge or intimation that he was to be called. The scene thus enacted before the jury tended to deprive this petitioner of a fair trial. The subsequent testimony by Stickney, which the Government attorneys regarded as of sufficient importance to use, cannot have but led the jury to conclude that the sins of Stickney were likewise the sins of Beck. They could well have assumed that Stickney and Beck had a common cause, from which Stickney was bolting. The confidential, if not privileged, character of the subjects of discussion in the numerous conferences that had occurred previously were such as to clearly put this petitioner at a disadvantage. Proper preparation of the defense in this situation could not but have been seriously hampered.

In the case of Heitler v. U. S., 244 F. 140, the United States Court of Appeals for the same circuit had before it a situation possessing some similarities with the one which here arose. There, counsel for one of several defendants, prior to the start of the trial, suspecting that one of the codefendants was going to testify for the Government, inquired of the prosecutor whether he was correct on this point, and was answered in the negative. Notwithstanding the denial, petitioner's counsel still remained suspicious. After the case was under way the particular codefendant did in fact take the stand as a witness for the Government. In refusing to uphold the petitioner's contention that this use of a codefendant as a witness after the trial had started was unfair, the Court pointed out, l. c. 142:

> "Under the facts indicated and particularly with the attention of the Prosecutor challenged thereto, the Prosecutor should frankly have stated in the beginning that the Government expected to call these defendants as witnesses and that Rosenzwig had been promised immunity for his testimony. He might fur-

ther, with entire propriety, before the trial began, have asked severance (which under the circumstances would undoubtedly have been granted) as to the defendants who were to testify and thus have avoided the possible unfairness to the other defendants in leaving the Court without discretion to separate witnesses who remain only in name as defendants on trial. **If, from the situation disclosed, the record did not leave it clear that no harm came to plaintiff in error through the Prosecutor's failure to so disclose and ask severance, it would be the duty of this Court to set aside the judgment.**" (Emphasis ours.)

Further:

"**Bachrach's suspicion** that the codefendants would testify for the Government **was voiced from the start**; so it is not supposable that **through reliance on the bona fides of their defense he was tricked into any harmful co-operation with them.**" (Emphasis ours.)

In the instant case this petitioner and his counsel were certainly misled, if not actually tricked, into harmful co-operation with Stickney, who was not represented by counsel.

Besides, the effect upon the jury of the reaction produced upon his codefendants and their counsel by the surprise calling of Stickney; the objection made in open court to his testifying for the Government, and the undoubted indication of surprise and concern and even confusion on the part, among others, of this petitioner and his counsel, cannot but have had a harmful and damaging effect upon the jury.

In this connection it would seem only reasonable to conclude that the jury was left with an indelible impression that if Stickney was guilty, his codefendants were also guilty, and possibly also, that Stickney's testifying as a Government witness was impelled by a desire to have the

truth come out, and all in all, the incident must have attached to his testimony in the minds of the jury a significance which it would otherwise not have had. The occurrence, we submit, does not conform to the doctrine of according a fair trial to the accused, and in this case it was undoubtedly prejudicial and should compel a setting aside of the conviction.

The case of Minker v. U. S., 85 Fed. (2nd) 425, in addition to the Heitler case, would seem to point to the principle which should apply.

Mr. Eben, Assistant United States Attorney, in charge of the prosecution, in the oral argument before the Court of Appeals, attempted to differentiate between the situation present when Stickney was called as a witness and that which existed in the Heitler case (244 Fed. 140). He told the Court that there was no agreement before the trial commenced that Stickney would be called as a witness in contrast to what he said was the situation in the Heitler case. He then said that what actually took place was that before the trial, Stickney had, in fact, offered to testify for the Government, but that he, Eben, would not agree to use him unless Stickney would agree to plead guilty, and this, Eben stated, Stickney was unwilling to do. In this situation, according to Eben, he had no intention of using Stickney when the trial commenced. Yet it will be noted by the Court that what had thus transpired was not disclosed to the defendants, including petitioner, and that Stickney afterward, without any counsel to represent him, became and remained for four trial days closely associated with his codefendants in the conduct of the defense up to the very minute of his being called as a Government witness, conferring all this time with the other defendants and with their counsel and receiving the full and free cooperation of these defendants and their counsel, with the

defendants, including petitioner, and their counsel being all the while in complete ignorance of what had occurred between Stickney and the prosecution. Then, despite their supposed previous unwillingness to use Stickney as Government witness, except on condition that he plead guilty, the Government, because his testimony was valuable to them, saw fit to, and did, call Stickney as a witness, notwithstanding he still did not consent to plead guilty as the Government had previously insisted that he do. In this situation, we submit, there was little, if any, practical difference between what happened in the Heitler case and what occurred here.

The Court of Appeals, however, in its opinion (p. 7), refers to this petitioner's argument on the subject and dismisses it with this comment, "The trouble with this argument is that there is nothing in this record indicatng that Beck has been prejudiced; consequently, we are unable to say that Beck was deprived of a fair and impartial trial." We earnestly submit to your Honors, in all sincerity, that, in our humble judgment, the record does in fact indicate that petitioner was prejudiced, if we here adopt the same standard of determining this question as was used in the Heitler case, supra. The Court there said, in a situation somewhat similar, l. c. 142:

> "If, from the situation disclosed, the record did not leave it **clear that no harm came** to plaintiff in error through the Prosecutor's failure to so disclose and ask severance, it would be the duty of this court to set aside the judgment." (Emphasis ours.)

And again:

> "Bachrach's suspicion that the codefendants would testify for the Government was voiced from the start; so it is not supposable that **through reliance on the bona fides of their defense he was tricked into any harmful co-operation with them.**" (Emphasis ours.)

It seems to be the purport of the decision in the Heitler case, as we view it, that if there had been any doubt that harm had resulted, the Court would have reversed and remanded the case; and such harm could have come, as we understand the decision, if "through reliance on the bona fides of their defense he was tricked into harmful co-operation with them." If this interpretation of the Court's decision in the Heitler case is correct, then it would follow that the very elements which were pointed out as being lacking there, but which are, however, present here, would seem to call for a reversal in the instant case.

Here, there was reliance on the bona fides of the Stickney defense, and this petitioner was in effect tricked into harmful co-operation with him.

Besides, the reaction necessarily produced upon the defendants and their counsel by the surprise calling of Stickney as Government witness, including the undoubtedly resulting astonishment, confusion and concern, could not but have forcefully and indelibly impressed the jury with the conclusion that all the defendants must be guilty (as they found Stickney himself was) so as to deprive the petitioner of a fair trial. See Minker v. U. S. A., 85 Fed. (2nd) 425.

Mention was made by Government's counsel in the oral argument before the Court of Appeals that the record failed to show that the defendants and their counsel were so affected at the surprise calling of Stickney, but even so, we respectfully submit that judicial notice should be taken of the effect produced by this totally unexpected happening at the time, and, under the circumstances which existed, since it is common knowledge that human emotions would so react in such a situation. See Jones on Evidence (2nd Edition), Sec. 458; 23 C. J., p. 149, Sec. 1970.

CONCLUSION.

It is respectfully submitted, in view of the foregoing, that this case is one calling for the exercise by this Court of its supervisory powers by the granting of a writ of certiorari as prayed for in the petition, and, thereafter, for a reversal of the judgment of the United States Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

HARRY FISHBEIN and
EDWARD K. SCHWARTZ,
Attorneys for Petitioner.

APPENDIX.

In the
United States Circuit Court of Appeals
For the Seventh Circuit.

Nos. 7344, 7345, 7346, 7347, 7348.

October Term, 1940, January Session, 1941.

United States of America,
Plaintiff-Appellee,
vs.
Christian W. Beck et al.,
Defendants-Appellants.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

March 6, 1941.

Before EVANS and KERNER, *Circuit Judges*, and LINDLEY, *District Judge*.

KERNER, *Circuit Judge*. This is an appeal from judgments rendered on verdicts of guilty upon an indictment consisting of 18 counts, charging in the first 17 counts a scheme to defraud and the use of the United States mails in the furtherance of the same in violation of Section 215 of the Criminal Code, 18 U. S. C. A. § 338. The last count charged that the defendants unlawfully conspired to use the United States mails in furtherance of a scheme to defraud and sets forth 134 overt acts to effect the object of the conspiracy, 18 U. S. C. A. § 88. The jury returned verdicts of guilty as to all appellants on counts 1, 16 and

18 and, in addition, found Stickney and Beck guilty on counts 2 to 17, Ross guilty on counts 6, 8, 13 and 14, Woodring guilty on counts 5 and 7, Golby guilty on count 11, Greenbaum guilty on counts 5, 7, 8, 12, 13 and 14 and Harriss guilty on count 9. The defendants were each sentenced to imprisonment for various terms. To reverse the judgments appellants separately appealed.

The scheme charged in the first count of the indictment in substance is that the appellants and their co-defendants devised a scheme to defraud, by means of certain false and fraudulent representations and promises, a certain class of persons (naming 28 persons, 22 of whom testified at the trial) owning various shares of stocks, bonds and other securities of value, by means of letters sent through the United States mails and by means of oral communications, by inducing the persons intended to be defrauded, to assign and deliver to the First Commonwealth Trustees their stocks, bonds and other securities for investment in burial lots in Crown Hill, a cemetery in Twinsburg, Ohio.

The facts. In 1929 Christian W. Beck purchased 260 acres of land at Twinsburg, Ohio, and there established Crown Hill, Inc., a cemetery association, and at the same time organized Crown Hill Trust as the selling agent for Crown Hill, Inc. He had a controlling interest in each, was the chief executive, and all the other trustees took orders from him.

In 1936 Beck, Robert Stickney and Mike D. Gordon held a number of conferences and as a result Stickney and Gordon came to Chicago and established First Commonwealth Trustees to handle the sales of lots in certain sections of the cemetery for investment purposes. It was also agreed that Commonwealth would pay Crown Hill, Inc. $57 for each lot and the lots would be sold by Commonwealth for $160 per lot; that Crown Hill Trust would cease

selling lots at wholesale and would devote itself to the sale of lots for family use, and that Beck would finance Commonwealth up to $7500. The lots to be sold by Commonwealth were in an undeveloped portion of the cemetery.

Commonwealth was established with Arthur C. McHenry and Helen B. Nichols as trustees. Before coming to Chicago Nichols had for seven years been employed by Beck with Crown Hill, Inc. Beck advised her to go to Chicago because he wanted her in charge to watch his money. Beck also directed Gordon to go to Chicago and take charge of the men. Stickney was general manager and supervised all of the operations. He rented the offices, handled all correspondence, prepared sales kits for the salesmen containing facsimile laudatory letters from Beck and Crown Hill Trust customers, and he told the salesmen that lots would be sold for $160 instead of $100, for which they had been sold in Cleveland; that the Union Standard Guaranty Company would guarantee to pay a premium of $6 per year per lot for two years for the resale privilege from the purchaser and gave them a list of names of security holders, who had made inquiries concerning Commonwealth's plan whereby the securities holders could recoup their losses. Gordon, who prior to 1936 had been employed by Crown Hill Trust in Cleveland as a salesman, was sales manager and supervised the work of the salesmen. He hired Wolstein, Woodring, Greenbaum, Fleeman and a number of others to act as salesmen, assigned the men to their territories, gave each man a kit and told him that Beck had said that the lots would be ready for resale between 18 months and two years.

After the establishing of Commonwealth it purchased lists of names of persons who had invested in bonds and securities and a letter was sent to those residing in Minnesota, Wisconsin, Indiana, Iowa, Kansas and the two Dakotas to arouse their interest in the purchase of the burial

lots, and where interest was expressed by the recipients of the letters, salesmen of Commonwealth called on them and represented to them that if the depreciated securities owned by them were turned into Commonwealth in exchange for cemetery lots at the rate of $160 per lot, the lots so purchased would be resold by Commonwealth or Crown Hill Trust Trust within a period of two years.

When salesmen were successful in selling lots, a contract was entered into with the purchaser and forwarded to Commonwealth and deeds covering the number of lots purchased were forwarded to the purchaser or sent to the salesmen for personal delivery. The depreciated securities obtained from the purchaser were sold by Nichols for Commonwealth and the proceeds were applied on the purchase price of the lots. Of the $160 received from the purchaser on each lot, Stickney and Gordon each received a five percent commission and the salesmen a thirty percent commission. Stickney also received from Beck $5 for each lot sold, which he divided with Gordon.

A resale agreement was also entered into with each purchaser by which it was agreed that Commonwealth would resell the lots at a price fixed by the purchaser, up to a maximum of $450 per lot. The resale price was generally fixed by the salesmen so that it would appear that when the lots were resold at the price agreed upon, the purchaser would regain whatever amount he had lost by reason of his depreciation of the bonds or other securities turned in as payment for the lots.

To induce a prospective customer to enter into the contract for the purchase of the lots, a guarantee was in many instances given the customer guaranteeing the payment of fifty cents per month per lot for a period of two years. Union Standard Guarantee Company of Cleveland, Ohio, was the guarantor. This company was formed at Stickney's request and it did no other business except to guar-

antee the payments of premiums on the cemetery lots. Where the guarantee was used, $14 of the purchase price of the lot was forwarded to the guarantor, $12 thereof being returned to the purchaser over a period of two years, and the remaining $2 was used as a service charge.

Commonwealth closed its offices about May 1, 1937. None of the lots sold by Commonwealth to the defrauded persons were ever sold, nor was any effort made by Crown Hill Trust to resell the lots purchased by the victims. The following named appellants were employed over the following periods of time and received the amounts stated below: Stickney, $6768.02 for 5 months; Golby, $4789.33 for 8 months; Gordon, $6768 for 5 months; Greenbaum, $7194.73 for 5 months; Harris, $2609 for 3 months; Ross, $3024 for 5 months; Woodring, $1665 for 3 months and Wolstein, $4394 for 4 months.

The contested issues may be summarized as (1) the indictment was defective, (2) variance between the allegations of the indictment and the proof, (3) error in permitting Stickney to testify in behalf of appellee, (4) error in admission and exclusion of the evidence, (5) withdrawal of appellants from the conspiracy, (6) prejudicial remarks of the district attorney, and (7) no evidence to support the verdicts.

First. Appellants Ross and Golby contend that the indictment is defective in that the first 17 counts do not charge them with the use of the mails in a scheme to defraud. In other words the point is made that the indictment confined the scheme to Beck, Stickney and Gordon, and did not include the above appellants.

The first count of the indictment charges all of the defendants by name with devising a certain scheme and artifice to defraud, and to obtain money and property by means of false pretenses, representations and promises

from a class of persons then residing within the United States who owned various shares of stocks, bonds, certificates of deposit, and other securities of value, designated as the persons intended to be defrauded, then follows the names of such persons. Thereafter follows allegations as to what Beck, Stickney and Gordon did in the establishing of Commonwealth, the hiring of certain appellants as salesmen, a description of the scheme upon which the indictment was founded, and concludes that the foregoing representations and promises were false and fraudulent, and that at the time they were made by the said defendants, they, the said defendants, knew they were false. The indictment further alleged in what respect the representations and promises were false and finally alleged that the said defendants so having devised the said scheme to defraud, unlawfully used the United States mails in furtherance of said fraud.

To be sure, under the statute involved, it was necessary that the indictment charge the scheme with all such particulars as are essential to constitute the scheme so as to acquaint the accused with reasonable certainty of the nature of the accusation against him. To us it seems clear that the indictment was sufficient to inform appellants of the crime charged and to protect them from a second prosecution for the same offense. There can be no doubt under the allegations of this indictment that they understood they were being charged with the crime of using the mails to obtain money by means of false and fraudulent representations and promises and conspiracy so to do. Moreover, the sufficiency of the indictment is challenged for the first time in this court. After verdict, every intendment must be indulged in support of the indictment. No objection can avail, no prejudice appearing.[1]

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[1] *Dealy v. United States*, 152 U. S. 539; *Hagner v. United States*, 285 U. S. 427, 431; *Coates v. United States*, 59 F. (2) 173; *Crapo v. United States*, 100 F. (2) 996; and *Hewitt v. United States*, 110 F. (2) 1.

Second. Appellants Ross and Golby next contend that a fatal variance existed between the allegations of the indictment and the proof. They insist that the allegations of the last count, charging a conspiracy to use the mails and a scheme to defraud, were not proved, but if appellee proved any at all, it proved a number of independent conspiracies. The basis of the argument is that one group of salesmen made one type of misrepresentation, another group made a different misrepresentation and other groups of salesmen made still different representations. In support of this contention counsel cited the cases in the footnote.[2] These cases are to the effect that where one conspiracy is specially charged, proof of different and disconnected ones will not sustain conviction. We do not question the correctness of the proposition stated by these cases, but we do not think they are applicable here. In our case the substance of the charge with respect to the scheme is that the defendants, actuated by a fraudulent intent, devised a scheme to induce the persons named in the indictment to purchase cemetery lots. If there was a general plan in which all the defendants participated and if all the misrepresentations made were in furtherance of that conspiracy, the fact that one group of salesmen made one type of misrepresentation and another a different misrepresentation would not divide the conspiracy charged into separate conspiracies.

Third. Appellant Beck contends it was reversible error for appellant Stickney to testify for the appellee. The point is that the calling of Stickney tended to deprive Beck of a fair trial. We are of the opinion the point is not well taken.

In *Heitler v. United States*, 244 F. 140, our court had

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2 *Terry v. United States*, 7 F. (2) 28; *Wyatt v. United States*, 23 F. (2) 791; *Tinsley v. United States*, 43 F. (2) 890; *Dowdy v. United States*, 46 F. (2) 417; *Marcante v. United States*, 49 F. (2) 156; and *United States v. Siebricht*, 59 F. (2) 976.

occasion to discuss a somewhat similar problem and in that case it was said:

> "In general, defendants on trial, if testifying at their own request, are competent witnesses for the Government against their co-defendants on trial with them. The Act of Congress of March 16, 1878 [28 U. S. C. A. § 632] provides that in the trial of indictments, informations, etc., the person charged shall at his own request and not otherwise, be a competent witness * * *. This act renders any of a plurality of defendants on trial competent to testify either in his own behalf, or on behalf of any co-defendant, or the Government, provided only that he testifies at his own request."

In the instant case the record discloses that on the fourth day of the trial, the district attorney called Stickney to the witness stand. Thereupon, but not in the presence of the jury, the trial judge informed Stickney that he was not obliged to testify and furthermore that he would not permit him to do so unless it was at his (Stickney's) own request, to which Stickney replied that he knew his rights and at his own request desired to testify.

In his brief, counsel for Beck argues that Stickney was in continual conference with Beck up to the time he was called as a witness and neither Beck nor his counsel had any prior knowledge that he was to be called as a witness by appellee; that Stickney's testimony must have led the jury to conclude that Stickney's sins were likewise the sins of Beck. The trouble with this argument is that there is nothing in this record indicating that Beck has been prejudiced; consequently, we are unable to say that Beck was deprived of a fair and impartial trial.

Fourth. Appellants contend that the court erred in the admission and exclusion of evidence. Under this contention numerous complaints are made. We shall not discuss

all of them, but we desire to say that we have examined and considered them all and have concluded that neither those herein discussed, nor those not discussed, warrant a reversal.

The record discloses that one Swendiman, an attorney at law, testified that he represented William D. Brown (Brown was one of the persons who had been induced to purchase lots through appellant Woodring); that as Brown's attorney he had corresponded with Commonwealth. His letters to Commonwealth and answers thereto were received in evidence. The substance of this correspondence was that it was claimed that the transaction with Brown had been carried out through misrepresentations and in violation of the Securities Law of Minnesota and that Commonwealth admitted it had been ordered by the Minnesota Securities Division to cease and desist from further sales within that state.

It also appears that one Wells, a purchaser of lots, testified that appellant Golby had assured him that he could get a resale price of $600 for a lot; that at the time this representation was made Wells and Golby were in Henderson, Kentucky; that Golby called the Chicago office of the Commonwealth, spoke to some person and then handed the telephone to Wells. Wells then inquired if Golby was authorized to quote "terms like that; whether the office ratified it" and the man assured Wells that he was. Thereafter Commonwealth's letter to Wells was introduced in evidence. In this letter appears the following statement:

> "Your letter was the first intimation we had received concerning any statement, written or otherwise, by Mr. Golby, that your burial rights were to be resold at any specific time. We sold these rights on the wholesale plan and accepted a resale listing at a stipulated net price to you. Either we or our authorized selling agent were to resell the rights as early as possible, but not within any specified period."

In still another letter addressed to Wells, Commonwealth stated:

> "If you feel that you have been defrauded it is, of course, your privilege to call the facts to the attention of the authorities. We stand ready to defend our actions in the premises. As to Mr. Golby, if he committed any crime he deserves to be punished."

The trial court admitted the letters to show guilty knowledge as to the methods employed by the salesman in making sales and for that purpose we believe they were competent. *Osborne v. United States*, 17 F. (2) 246, 250.

Complaint is also made that it was error to permit Auditor Robinson to testify with respect to his examination of the books of Commonwealth. Robinson testified he was a postoffice inspector and had been employed in accounting work for 30 years; that he examined Commonwealth's ledger accounts showing commissions paid to salesmen, check stubs, cancelled checks, distribution of expense items, sales records and daily collections and that his analysis of the sales records indicated that there were 252 lots that were purchased for $25 each. On cross-examination, however, he testified that the books did not in fact show the purchase of any lot at $25, but that he obtained that information from an invoice which he found during his examination of the records of Crown Hill. The record also discloses that Helen B. Nichols had theretofore on cross-examination testified that some of the lots had been purchased at $25. Under the circumstances we fail to see wherein the testimony could be at all prejudicial.

Appellant Stickney makes the point that it was error to admit in evidence the minute books of Crown Hill, Inc., and Crown Hill Trust. They were competent as tending to show the value of the lots being sold by Commonwealth.

Appellants Ross and Golby contend that the trial court

should have permitted James B. Black to testify to a conversation he had with one Komlas on the development of Crown Hill Cemetery.

It appears that in 1929 Black came to Cleveland to work for Beck in connection with the construction of Crown Hill Cemetery and remained until the fall of 1937. During these years the development work was in his charge.

After December 15, 1936 one Komlas and his associates owned Crown Hill Cemetery. Prior to the purchase by Komlas, Black and Komlas had a conversation relative to the amount of development work yet to be done. He was then asked to relate the conversation to which appellee objected and the objection was sustained. Counsel for appellants then offered to prove that Black, in his conversation with Komlas, stated he had estimated the costs for the final development of the undeveloped lots at $125,000. Under this state of the record, we see no error in the court's ruling.

Fifth. Appellants Beck, Stickney, Fleeman, Wolstein, Harriss and Woodring next contend that if a scheme actually existed, they severed all connected with it before the offense charged was committed. The argument is that since all the mailings alleged in the indictment were after their respective withdrawals from the scheme alleged, they had no further responsibility for the possible continuation of the scheme to defraud.

Before proceeding to consider the law applicable it may be well to state the facts. The record discloses that appellant Beck resigned from Crown Hill, Inc. and Crown Hill Trust on December 15, 1936, but it also appears that in May 1937, at the time that Commonwealth closed its offices (after the date alleged in the first and last count of the indictment), he informed Mrs. Nichols to re-deed those lots which remained unsold by Commonwealth to the First

Refunding Corporation of Cleveland. Regarding Stickney, it appears that he submitted his resignation to trustee Nichols on October 7, 1936; that she called Beck and told him of Stickney's resignation; that after his resignation he left for Boston but thereafter returned to and worked for the Gil-Boat Company, a sub-tenant of Commonwealth where he remained until February 1937, during which time he wrote a number of letters for Commonwealth. Fleeman left Commonwealth's offices in July 1936 and Wolstein left in October 1936; Harriss' employment commenced in August 1936 and he left in November 1936, while Woodring left on September 16, 1936. So far as Fleeman, Wolstein, Harriss and Woodring are concerned, nothing more appears in the record than the fact that they left Commonwealth.

The general rule is that where an overt act is essential to a conspiracy, a conspirator may avoid guilt by withdrawing from the conspiracy prior to the commission of an overt act, 15 C. J. S. p. 1110. However, when once a conspiracy is shown to exist, which is not ended merely by lapse of time, it continues to exist as to all persons involved until there is shown some affirmative act of withdrawal by the persons who attempt to evade responsibility for the acts and declarations of their co-conspirators after the withdrawal.[3] Here the scheme was to continue over a long period of time. In such a case where the conspiracy is proved, the acts and declarations of one of the conspirators toward the accomplishment of the unlawful scheme, are the acts of all. *Bogy v. United States*, 96 F. (2) 734, 741. In the instant case mailings on various dates were alleged, but all were alleged to be a part of one scheme. Under such circumstances whether an effective

[3] *Hyde v. United States*, 225 U. S. 347; *Local 167, etc. et al. v. United States*, 291 U. S. 293, 298; *United States v. Borden Co.* 308 U. S. 188, 202; *United States v. Rollnick*, 91 F. (2) 911, 918; *United States v. Anderson*, 101 F. (2) 325, 331; and *United States v. Weiss*, 103 F. (2) 348, 354.

withdrawal was made by the taking of affirmative action was a question of fact for the jury.[4]

Sixth. We now consider the alleged misconduct of the assistant district attorney. Counsel for appellants argue that his conduct was such as to prejudice the jury. The argument has to do with the cross-examination of appellants Beck, Golby and Woodring. We have examined the particular instances cited and are not ready to say that the cross-examination was indicative of unfairness and that it was prejudicial in view of the evidence in this case.

Seventh. We come finally to the contention that there is no evidence to support the verdicts. It is clear from the facts already shown that there is not the slightest doubt or uncertainty as to the evidence of fraud as it relates to appellants Beck, Stickney and Gordon. These three boldly conceived and brazenly executed the scheme to fleece the public, *United States v. Wise*, 108 F. (2) 379, 380. We shall therefore pass on to a review of the evidence as it relates to the other appellants.

Barney Wolstein. Charles Cockle, a hardware dealer, and Earl B. Fox, a 75-year old retired rural mail carrier, testified that Wolstein represented that if their securities were exchanged for cemetery lots they would receive back a resale price, to be fixed by them, within 18 months and two years respectively. To Fox he said it was "sure as death." Wolstein testified that he had believed the representations were true and that in arriving at the resale figures for customers he always fixed the resale price at such an amount so that the customers would receive, if the lots were resold, the amount which they had lost by reason of the depreciation of their securities.

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4 *Hyde v. United States, supra; Reuben v. United States*, 86 F. (2) 464, 469; *United States v. Dubrin*, 93 F. (2) 499, 504; *United States v. Weiss*, 103 F. (2) 348, 354; and *United States v. Bob*, 106 F. (2) 37, 39.

William Woodring. This appellant commenced work for Crown Hill as a driver in 1933 and later as a salesman. He was implicated by the testimony of William and Edna Benz and William D. Brown. The Benzes testified that Woodring came to their home on June 22, 1936, and said that they (Benzes) could turn in their bonds and liquidate their losses by investing in the lots for which they would receive, at the end of 24 months, $450 for each lot. To Brown he represented that the lots were in a well developed part of the cemetery and would be resold within 24 months at $450 per lot; that Commonwealth had 70 men employed in Cleveland reselling lots at anywhere from $500 to $1000 a lot and that the proposition was one of the surest of businesses, "as good as Government bonds," and that he was familiar with the cemetery and knew the lots sold to Brown and the Benzes were in an undeveloped, remote section of the cemetery.

Harold Ross. Three of the victims testified against Ross. In his talks with Westhafer, a school teacher, he told her he knew she had bonds that had ceased to pay; that he represented a corporation which hoped to get a controlling interest in the bonds, without mentioning at that time anything about cemetery lots. Later, he said, cemetery lots would be given to her as security for her bonds and would be sold within two years at $450 per lot. He followed the same procedure with McCord, a 70-year old farmer. Before Ross called on McCord, McCord had received a card through the mails, inquiring if he had any securities; upon McCord's answering Ross called and was given a list of the securities. Ross said the lots would be worth double the amount of the bonds and that he would guarantee that price for the lots within two years. To McCrory he represented that the lots would be sold within two years at $500 per lot.

Mort D. Greenbaum. This appellant was implicated by

the testimony of Rosa Reamer, Martin E. Norton, Edward L. Berg and Nye McCrory. These witnesses testified that they had been contacted by other salesmen before Greenbaum appeared on the scene. Reamer testified that in September 1936 Greenbaum told her if she made an additional investment in the lots she would double her money within nine months because of the sales program "they were putting on." Brown, who had previously been sold by Woodring, was contacted by Greenbaum and was told that if he would put up bonds as collateral he would be given lots for the bonds and they would be used to finish a Cathedral at the cemetery and that at the end of two years, his bonds would be returned, together with the difference between $450 and $160. His bonds were not returned.

Norton, who had been previously sold by Woodring, testified that Greenbaum told him that Crown Hill had sold a large number of lots to a fraternal organization and had $700,000 on hand which was soon to be distributed, and that if Norton deposited additional collateral, Norton would get his money back inside of 10 months.

H. W. Fleeman. Robert Little, a mail carrier, Nellie E. Burton and Charles Pierce testified against this appellant. Fleeman represented to Little that the lots would be resold within two years at $450 per lot. To Burton he said the lots would be in a good place; they were in front, no trouble in selling them; they would be one of the first to be sold. Neither Fleeman, Greenbaum nor Ross testified in his own defense.

Jack Harriss. Testimony implicating this appellant was given by Charles Prokop and Bernice Albrecht. They had been solicited by co-defendant Shayer and induced to part with their securities upon Shayer's representations that Commonwealth could offer to pay a higher price for the

securities, since it did not have to pay "property or income tax on the cemetery." Prokop's securities were valued at $18,000 and at the time he delivered the securities to Shayer he was told he would receive $18,000 in money. Instead of cash, he was given deeds to lots in the cemetery. Shayer also told Albrecht that she would be paid in cash or United States Government bonds.

In both instances, a few days after Shayer's call, Harriss delivered deeds to cemetery lots to Miss Albrecht and Prokop. To Miss Albrecht he said "everything would be all right, but that it would be at least six months before she could get anything, as it would take that long for lawyers to straighten out the papers; that the longer she left her money in the more she would make, but that she had to take it out after 24 months." He advised Prokop to place the deeds in his safe and at the end of sixty days he would receive cash for them. After each of these deals Harriss and Shayer returned to Chicago and divided the commissions.

Harry D. Golby. Three witnesses testified against Golby. In selling lots to George H. Wells, a retired school teacher, Golby represented the lots would be sold within one year. With respect to McCord and Nye McCrory, he followed up Ross. In November 1936 he called upon McCrory and told him he represented Commonwealth and had good news; that Commonwealth had a reserve fund which either had to be paid to the Government or to lot owners and would be paid prior to May 1, 1937. As a result of these representations McCrory was induced to purchase additional lots. In his own behalf Golby testified that he merely followed instructions given to him and in making the representations he relied on the kit he received from Commonwealth.

While it is true that if the evidence is as consistent with innocence as with guilt, no conviction can be had, it

is also true that overt acts of the accused may be considered with all the other evidence in determining his guilt. And where the overt acts are of a character that are usually, if not necessarily, done pursuant to a previous scheme and plan, proofs of the acts have a tendency to show such pre-existing conspiracy, so that when proved they may be considered as evidence of the conspiracy charged, and if the established facts and inescapable inferences are inconsistent with the accused's professions of innocence, it becomes the problem of the jury to weigh the evidence and determine, under proper instructions dealing with the quantum of evidence of proof necessary to convict, the guilt or innocence of the accused.

And so in this case it was proper for the jury to consider all of the evidence and from all the facts and circumstances determine whether the crimes charged in the indictment had been established beyond a reasonable doubt. Each of these appellants were identified and proved to have told some of the falsehoods which furthered the scheme to work on the sale of the lots. There was enough against each of them to require that the evidence be submitted to the jury for its determination as to whether each was connected with the fraudulent scheme in furtherance of which the mails were used, and the jury has rendered verdicts against the appellants which are binding on us.

We have now considered all of the assignments of error and being convinced that no error has intervened justifying a reversal, the judgments of the District Court will therefore be affirmed.

A true Copy:

Teste:

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Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.